



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION CAUSE NO.123 OF 2015

IN THE MATTER OF THE ESTATE OF

PILI MOMANYI (DECEASED)

MOMANYI OCHAKO.....OBJECTORS/APPELLANTS

WYCLIFFE OCHAKO MOMANYI

VERSUS

ROSELYN BANCHIRI OUKO.....RESPONDENTS

GEORGE MORARA OUKO

JUDGMENT

1. Before me is an application dated 25th March, 2015 by way of Summons for Revocation of Grant brought under Section 76 (a) (b) and (c) of the Law of Succession Act seeking orders as follows:-

1. spent

2. That this Honourable Court be pleased to grant an order of inhibition restraining the Respondents from sub dividing, disposing or undertaking anything on the estate of the deceased's property NYARIBARI MASABA/BOMOBEA/1376 and 2233.

3. That this Honourable Court be pleased to grant an order of injunction restraining the Respondents by their agents, servants or any other person claiming under them from transferring, disposing, sub-dividing or interfering with any other property of the deceased PILI MOMANYI pending hearing and determination of this application.

4. That this Court be pleased to make a declaration that NYAMIRA CM'S COURT has no jurisdiction to determine a Succession cause whose subject is more than Kshs. 100,000/=.

5. That this Honourable Court be pleased to revoke the Grant of Letters of Administration granted to the Respondents ROSELYN BANCHIRI OUKO and GEORGE MORARA OUKO on the 17th July, 2014 vide NYAMIRA CMCC SUCCESSION CAUSE No. 27 of 2013.

6. That this court be pleased to order the Respondents to file and account for the entire estate of the deceased as at the time of his demise on 23rd November, 2011 to date.

7. That cost of this Application be borne by the Respondents.

8. That such further and/or orders be made as the Court may deem fit and expedient.

2. The said application was anchored on the following grounds listed on the body of the application:
 - a. **That the Respondent obtained Grant issued on the 17th July, 2014, fraudulently by concealment of material facts to the Court.**
 - b. **That the Respondents have already been issued with a certificate of confirmation of grant dated 17th July, 2014 and have commenced distribution thereof.**
 - c. **That the grant has therefore been issued to a stranger to the estate who do not feature in the line of consanguinity and therefore failed to proceed diligently with administration of the estate.**
 - d. **That by the time of filing the succession proceedings before the subordinate court they deliberately failed to disclose the interest of the applicants as beneficiaries and creditors to the estate of the deceased.**
 - e. **That the Respondents failed to disclose the full schedule of assets and liabilities belonging to the estate of the deceased as at the time of his demise.**
 - f. **That Honorable Chief Magistrate, NYAMIRA LAW COURTS had no jurisdiction to issue the grant herein as the value of the Estate of the deceased exceeded the sum of Kshs. 100,000/= pursuant to Section 48 Cap 160 Laws of Kenya.**
 - g. **That the Grant was issued vide NYAMIRA CM'S COURT SUCCESSION CAUSE No. 27 of 2013 is a nullity in Law.**
 - h. **That the Respondents disposed off some portions of the estate before a grant of Administration could be confirmed.**
 - i. **That it is in the interests of justice that the Grant issued on 17th July, 2014 be revoked.**
3. The application is supported by the 1st applicant's affidavit sworn on 28th March, 2015 in which he repeated the grounds already stated on the body of the application and added that the fraudulent actions of the petitioner exhibited by his failure to disclose all the assets and liabilities of the estate and further distributing the estate of the deceased before the confirmation of grant amounted to disinheriting other beneficiaries of the estate.
4. The 1st applicant deposes that the grant issued by a court that lacked jurisdiction was null and void ab initio.
5. The 1st applicant deposes that the deceased was his son and that he had several properties including 2 motor vehicles, bank accounts, shares in Mwalimu Sacco, Modern Bar, pieces of land and other properties whose value exceeds sum of Kshs. 100,000/= that was then the limit of the pecuniary jurisdiction of the Nyamira Court that handled the succession cause.
6. The applicant has attached documents as annexures to the affidavit which include a certificate of official search in respect to LR NO. NYARIBARI M/BOMOBEA/2233 which he claims has been transferred to the 1st and 2nd Petitioner herein yet 2nd petitioner is not a beneficiary to the deceased's estate.
7. The application is further supported by the affidavit of WYCLIFFE OCHAKO MOMANYI the 2nd Applicant/Objector who deposes that he is a brother to the deceased and in whose trust the deceased held some of the properties whose full schedule the petitioners did not disclose.

8. The 2nd applicant states that while he was working in the United States of America, he entrusted the deceased to purchase and hold for him pieces of land, Motor vehicle registration numbers KAJ977R, KBE 701V, a petrol station and funds in bank account, the 2nd applicant has annexed to his affidavit copies of photographs, log books, search certificates, bank documents and agreement in support of his claim on the assets held by the deceased.
9. It is the 2nd applicants case that in view of all the assets held for him by the deceased, the value of the entire estate exceeds Kshs. 100,000/= and therefore, the lower court lacked jurisdiction to hear and determine the succession case by issuing grant and confirming the same.
10. The 2nd applicant further depones that the respondents have embarked on distributing the estate of the deceased even before the confirmation of grant.
11. The 2nd applicant depones that the 2nd respondent is not related to deceased in any way and therefore lacks the locus standi to be a petitioner or a beneficiary in respect to the deceased's estate.
12. On 9th April, 2015, the Objectors/Applicants obtained a court order of inhibition to restrain the respondents from sub-dividing, disposing or undertaking anything on the estate of the deceased's property being **MASABA/BOMOBEA/1376 and 2233** pending inter-partes hearing.
13. On 9th June, 2015 a temporary order of injunction was issued to restrain the respondents or their agents from transferring, disposing, sub-dividing or interfering with the property of the deceased pending interpartes hearing of this application.

Respondent's replying affidavit

14. The 1st respondent herein ROSELINE BANCHIRI OUKO filed her replying affidavit on 23rd September, 2015 in which she depones that she is the widow of the deceased who was survived by herself and her 3 children aged between 18 and 8 years. She depones that the objectors have not demonstrated that they are either the dependants or beneficiaries of the deceased so as to entitle them to file the instant application. She further depones that the 2nd applicant has not proved that the deceased bought any property on his behalf or that the properties he has listed as having been left out of the deceased's schedule of assets actually belong to the deceased.
15. The 1st respondent states that the applicants lack the capacity to revoke the grant duly issued to her by the court and that the instant application is ill-motivated and is filed with the sole intention of interfering with her administration of the estate.
16. The 1st respondent further contends that the instant application is solely intended to disinherit her and her children.
17. On 11th November, 2015, parties agreed to canvass the instant application by way of written submissions.

Applicants' submissions

18. The applicants state the issues for determination to be.
 1. **Whether the grant of Letters of Administration made to the respondents on 17th July 2014 should be revoked.**
 2. **Whether the resident magistrate who confirmed the grant had the requisite jurisdiction to do so.**
 3. **Whether the 2nd petitioner ranks in priority to the objectors by virtue of the provisions of Section 66 of the Law of Succession Act Cap 160.**

19. The applicants submit that the 1st Applicant, who is the father to the deceased, was a dependant and this was a fact that was concealed from the court which is a strong ground for revocation of the grant under **Section 76 of the law of Succession Act**.
20. The applicants contend that the 2nd petitioner is a brother in law to the deceased not mentioned as a beneficiary in the P&A 5 but benefitted from the estate contrary to the provision of **Section 29 of the Law of Succession Act**.
21. The applicants further argue that **Section 51 (1) (h)** of the law of **Succession Act** stipulates that the petitioner should give a full inventory of all the assets and liabilities of the deceased, yet the petitioners left out several properties of the deceased including motor vehicles, pieces of land, shares in Mwalimu Sacco, Modern Bar in Keroka, Petrol Station and bank accounts contrary to the provisions of **Section 51 of the Law of Succession Act and Rule 7 of the Probate and Administration Rules**.
22. Lastly, the applicants contend that in line with the clear provisions of Section 48 of the Law of Succession Act, the Lower court at Nyamira lacked the requisite pecuniary jurisdiction to entertain the succession case since the gross value of the deceased estate exceeded the Kshs. 100,000/= limit.
23. The applicants relied on the cases of **Dan Onya Kodwar vs Samwel Otieno Odwar (2015) KLR and Musa Nyaribari Gekone & 2 others vs Peter Muiyenda & Another C.A at Kisumu No. 2 of 2014**.

Respondents submissions

24. The respondents submissions are a replica of the facts already stated in the replying affidavit sworn on 23rd September, 2015. The 1st respondent submits that she is the legal widow of the deceased while the 1st and 2nd applicants are the father and brother of the deceased respectively.
25. The 1st respondent contends that the 1st applicant is deceased thereby leaving only the 2nd applicant as the Objector. According to the Petitioners, Section 29 of the law of Succession Act defines a brother as a dependant only if he was being maintained by the deceased immediately before his death.
26. In the instant case however, the 2nd applicant has not demonstrated that he depended on the deceased immediately prior to his death or at all.
27. It is the respondent's case that the applicants have not demonstrated that the deceased owned any other property other than the ones listed in the application for confirmation of grant or that the deceased's assets valued beyond the sum of Kshs. 100,000/=.
28. The respondents submit that the authorities cited by the applicants are distinguishable from the instant case as in this case, the applicants have not demonstrated that they have any interest in the deceased's estate as opposed to the circumstances in the authorities cited.

Analysis and Determination

29. I have considered the application brought by way of summons for Revocation of Grant, the replying affidavit thereto, the submissions filed by the parties respective lawyers and the authorities cited. The issues that arise for my determination are:
- a. **Whether the lower court had the requisite jurisdiction to entertain the succession cause filed in respect to the estate of the deceased of Letters of Administration.**
 - b. **Whether the grant made to the petitioners/respondents on 6th January, 2014 and confirmed**

- on 17th July, 2014 should be revoked and/or annulled.
- c. **Whether the 1st and 2nd Applicants are beneficiaries in the estate of the deceased.**
 - d. **Whether the 2nd respondent is entitled to inherit the deceased's estate as a beneficiary in the said estate.**

30. On the question of jurisdiction, the applicants have stated that the estate of the deceased comprised many assets other than the ones listed in the schedule of assets of the deceased. The said assets are alleged to include pieces of land, bank accounts, motor vehicles, petrol station, a Modern Bar and Mwalimu Sacco shares.

31. On this point, I have perused the documents annexed to the affidavit of the 2nd applicant as documents of proof of the deceased ownership of the said properties left out of the schedule of assets and I note that none of the documents provide the sufficient proof that would entitle this court to hold that indeed some of the assets of the deceased were concealed or left out of the schedule of assets or that the gross value of the assets exceed the pecuniary jurisdiction of the lower court.

32. The copy of records in respect to the motor vehicles shows that the motor vehicle Reg. No. KBE 701V belongs to one Mutisya Josephat as at 16th February 2015 while motor vehicle Reg. No. KAJ 977R is in the name of one Johna K. Muita as at 16th February 2015. Clearly therefore, the petitioners could not have included properties that are not registered in the name of the deceased in the deceased's schedule of assets.

33. In respect to the alleged bank accounts, applicants have not shown any bank statements from the alleged accounts to prove their existence or the amounts held therein as at the time of the deceased's death.

34. The Motor vehicle sale agreement attached to the affidavit in respect of **Motor Vehicle Reg. No. KAJ 997R** is shown to have been entered into between the deceased and one **Abel Mburia Kariuki**. As I have noted hereinabove in this judgment, the Motor vehicle registrars records shows that he said vehicle is registered in the name of **John K. Mwita** as at 16th February 2015 and so clearly, if there was any sale agreement made between the deceased and **Mburia Kariuki**, then that sale had not been actualized through a valid registration in the motor vehicle registrars records and therefore that asset, cannot clearly be included in the list of assets of the deceased.

35. No documents of proof of ownership have been availed by the applicants in respect to the alleged Modern Bar at Keroka and Petrol station so as to entitle this court to hold that those were part of the assets belonging to the estate of the deceased.

I find that the annexed photographs of the motor vehicles and petrol station are not sufficient proof of ownership.

36. With regard to the Mwalimu Sacco shares and parcels of land, I note that he same were duly included in the deceased's schedule of assets as shown in the certificate of confirmation of grant.

37. On jurisdiction, **Section 48 of the Law of succession Act** states as follows:

“(1) Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49, a magistrate shall have jurisdiction to entertain any application and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed the pecuniary limit prescribed under section 7(1) of the Magistrates' Courts Act, 2015.

(2) For the avoidance of doubt it is hereby declared that the Kadhi's courts shall

continue to have and exercise jurisdiction in relation to the estate of a deceased Muslim for the determination of questions relating to inheritance in accordance with Muslim law and of any other question arising under this Act in relation to such estates.”

38. The applicants alleged that the value of the estate of the deceased exceeded Kshs. 100,000/=. This allegation was however not proved by way of any documentary evidence. This court cannot therefore approximate the value or worth of the deceased estate and hold that it exceeded 100,000/=. I therefore hold that this ground of lack of jurisdiction by the lower court was not proved and I therefore reject it.

39. I similarly find that the ground that not all the assets of the deceased were disclosed was also not proved.

40. On whether or not the 1st and 2nd applicants were dependants beneficiaries of the estate, **Section 29 of the Law of Succession Act** states as follows:

“For the purposes of this Part, "dependant" means—

(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) such of the deceased’s parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and

half-sisters, as were being maintained by the deceased immediately prior to his death; and

(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”

41. A reading of the above Section at 29 (b) shows that for a brother and a parent (read applicants) to claim to be the deceased’s dependants, they needed to have demonstrated to the court that they were deceased’s dependants immediately prior to his death.

42. I find that in this case, this aspect of dependency was not proved. The 2nd applicant alluded to the fact that the deceased held certain assets in trust for him as he would send him money from the USA to purchase the said assets. Once again, this trusteeship was not proved and neither was the cash transfer or the assets purchased on behalf of the 2nd applicant shown.

43. In respect to the 2nd respondent, it has been stated that he is the brother in-law to the deceased meaning that he is the brother to the 1st petitioner. The deceased and the 1st petitioner were husband and wife respectively. All the 3 children of the deceased were minors at the time the succession case was filed before the lower court. The law under **Section 58 of the Law of Succession Act** provides that at least 2 administrators be appointed in such situations where some of the beneficiaries are minors and there is therefore a continuing trust. It was therefore upon the mother of the children, the 1st petitioner/Respondent, to elect whom to enjoin as a co-administrator and who can assist her take care of the minors interests. In this regard I do not find the inclusion of the 2nd petitioner in these proceedings as a co-administrator unlawful. The deceased minor children are in the care and custody of their mother who is entitled to act on their behalf and in their interest.

44. **Section 76 (a), (b) and (c) of the Law of Succession Act** under which this application has been filed provides as follows:

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;”

45.From my findings on each of the issues for determination enumerated hereinabove, I do find that the instant applicant does not meet the threshold of grounds listed under **Section 76 of the Law of Succession Act**, for revocation or annulment of grant.

46.In a nutshell therefore, the order that commends itself to me is to disallow the said application dated 25th January, 2015.

47.Bearing in mind the fact that this case involves parties who are related, I order that each party shall bear their own costs.

48.It is so ordered.

Dated, signed and delivered in open court this 26th day of April, 2016

HON. W. A OKWANY

JUDGE

In the presence of:

Mr. Sagwe for Nyamabati for the Objector

Mr. Anyona for Ogari for the Respondents

Omwoyo: court clerk